

IN SENATE OF THE UNITED STATES.

JANUARY 31, 1848.

Submitted, and ordered to be printed.

Mr. JOHNSON, of Louisiana, made the following

REPORT :

[To accompany bill S. No. 116.

The Committee on Private Land Claims, to whom was referred the petition of Balie Peyton, report:

That this claim was examined by the Committee on Private Land Claims, on the 30th March, 1846, and favorably reported upon. That report is concurred in and adopted by the present committee, and a bill for the relief of the petitioner is herewith reported.

IN SENATE OF THE UNITED STATES—*March 30, 1846.*

Mr. JARNAGIN made the following report:

The Committee on Private Land Claims, to whom was referred the memorial of Balie Peyton, praying the purchase by the United States of his undivided moiety of a tract of land, at the southwest pass of the Mississippi river, occupied by the United States for public purposes, have given to it, and the papers submitted as evidence, an attentive examination, and now present the result in the following report:

The facts of this case are well made out, and sustained by proof. The committee are satisfied that, in the year 1833, John Fitzgerald was appointed an inspector of the customs at New Orleans, and, as such, was despatched to the mouth of the Mississippi, to act as boarding officer. No place had been then provided for his residence by the government of the United States, nor was he required to reside upon any particular spot of land, but all was left to his own discretion, and, in selecting a residence, he was at liberty to follow his own fancy and interest. His official station was at the southwest pass, at the mouth of the Mississippi; and for his residence upon land he selected the place which

had been occupied by his predecessors, for a series of years, before the year 1830, and went into possession. Upon this spot of land no improvements have ever been made, or buildings erected, by or at the expense of the United States, nor was Fitzgerald, or any other officer of the government, required to reside thereon; nor has it been, in any way, reserved for the use of the United States. Fitzgerald made sundry improvements at his own expense, and for his own convenience and comfort, upon this piece of land; and from 1833 up to 1836, he and his wife occupied, cultivated, and enjoyed the same. Prior to 1836, the section of country, including the land upon which Fitzgerald resided, was surveyed, under the authority of the United States, preparatory to sale and appropriation by entry. On the 2d of June, 1836, Fitzgerald and wife made application to the register and receiver of the land office for the southeastern district of Louisiana, at New Orleans, within which district the place of their residence was situated, to be permitted to enter as occupants the place of their residence. In this application they say, and swear, and prove the same facts by John Leach and C. Lawrenby, that, "in virtue of an act of Congress approved on the 19th June, 1834, entitled 'An act to revive the act entitled an act to grant pre-emption rights to settlers on the public lands, approved on the 29th May, 1830,' we apply to become purchasers of a certain tract of land, situate and lying in township No. 24, range No. 30 east, designated as and being section No. 8, containing 160 acres, *agreeably to the township plat on file in the register's office*. We cultivated the said tract of land, designated as above, in the year 1833, by raising corn, &c., thereon; and, continuing on the same, were in the actual possession and peaceable occupancy thereof at the date of the passage of the above-mentioned act. We, therefore, pray that we may be permitted to enter the said tract according to law." On the 18th of June, 1836, they were permitted to enter, and did enter, said tract of land, and paid to the United States the purchase money; and the register of the land office issued to them a certificate, No. 1,360, for the land so entered. It appears, at this time, the fact was not doubted, that the land had been regularly surveyed, a township plat duly made out and filed in the register's office, and that occupants had a right and were permitted, to make entries. Upon their entry thus made, and certificate issued, they applied for a patent, which was refused at the General Land Office, upon the ground that the land had been reserved from sale by the United States. No such reservation had been made at the date of the entry; but, on the 3d of November thereafter, a letter was addressed to the register of the land office at New Orleans, by the Commissioner of the General Land Office, at the request of the Secretary of the Treasury, directing him to reserve the tract designated on the plat as section 8, township 24, range 30 east, from sale, as the same was important to the United States for a light-house. It was believed the light-house, then standing at the southwest pass of the Mississippi, was mislocated, and not likely to be permanent; and Congress having made an appropriation to build another, it became

necessary to select a new site; and a naval officer was directed to make the necessary surveys, and to select the site. He selected the spot where Fitzgerald resided, where he had an occupant right, and which he had entered by the description of "section 8, township 24, range 30 east, agreeably to the township plat on file in the register's office." This selection was approved by the government; and an offer was made to return to Fitzgerald the money he had paid into the land office for the land including said site. He refused to receive it, and claimed the land. The site was important to the United States, being the only eligible spot upon which to erect the contemplated light-house. Right was compelled to yield to force, and the erection of the light-house was commenced; but so much respect was paid to the claim of Fitzgerald and wife, that, on the 5th of January, 1837, the United States instituted suit by petition against them, in the district court of the United States in and for the eastern district of Louisiana, to oust them of the possession of said tract of land. The land sued for is described in the petition as "containing one hundred and sixty acres, and known and lying in township No. 24, of range No. 30 east, designated as and being section No. 8, and containing the aforesaid number of acres, according to an authentic plan, to be exhibited on the trial." After what has been stated, it seems odd, and almost incredible, that it should ever have been doubted, or made a question, whether the United States had or not erected the light-house upon the land claimed and entered by Fitzgerald and wife; but such has been the case, which will be noticed hereafter. Process was served upon Fitzgerald and wife. They appeared, and pleaded possession, settlement, entry, survey, and the payment of the purchase money. These points were material and traversable, but were not traversed, but granted by the United States, and have become, since the decision of the cause in the Supreme Court, parts of the "*res judicata*." The points contested and forming the issues between the parties were, whether Fitzgerald, being an officer in the service of the United States, could acquire a right of occupancy by a residence necessary for the discharge of his official duties; and whether the *locus in quo* had or not been reserved from sale or entry. All other facts presented in the pleadings stood admitted and ready for the judgment of the law. This cause was transferred from the district to the circuit court of the United States; and in December, 1839, it came on for trial before the Hon. J. McKinley, presiding judge. The court inquired into, not only the claim set up by the United States, but, in accordance with the pleadings, the laws and usages of the State of Louisiana; examined into and passed upon the validity of defendant's title; and, after full proof, and a thorough examination of all the facts deemed essential to a perfect understanding of the case, rendered the following judgment.

"In this cause, the court having maturely considered its opinion, now order, adjudge, and decree, that the defendants be quieted in their possession of the premises in dispute, and that the plaintiffs take nothing by their petition."

While this suit was pending, in the month of April, 1839, Fitzgerald and wife sold and conveyed, for a valuable consideration, and according to the laws of the State of Louisiana, where said land lies, the tract entered by them as section 8, township 24, range 30 east, to Richard M. Carter and Balie Peyton, as tenants in common. The government of the United States had erected upon the premises, and within a few paces of Fitzgerald's dwelling house, a valuable light-house, being the only place suitable for the erection of a light-house at the southwest pass of the Mississippi river. The importance of the position to the government is apparent; and not easily estimated by dollars and cents. Carter and Peyton having purchased the title of Fitzgerald and wife, (which purchase, from anything which appears, cannot be impeached for fraud,) immediately after the decision of the cause in the circuit court, opened a negotiation with the Secretary of the Treasury for a sale to the United States of said tract of land for the use of the government. The necessity existing for the United States to have the property was not doubted or denied; but the Secretary was dissatisfied with the judgment of the circuit court, and disinclined to purchase before the question of title should be further investigated and adjudicated; and therefore, with the advice of the Attorney General, directed the suit to be taken, by writ of error, to the Supreme Court of the United States, which was done. That court, in January, 1841, affirmed the judgment of the circuit court, and thereby gave to the defendants in error a title, or, in the language of Mr. Gilpin, the Attorney General, "a possession which nothing is to disturb. A patent could give them no more." From this time up to August, 1842, the title of Carter and Peyton was not disputed; but a correspondence was kept up between them and the Treasury Department in relation to the price to be given by the United States. No agreement could be effected, and the matter was submitted to the arbitration and award of James McCulloh, First Comptroller of the Treasury, and the Hon. Pierce M. Butler—the first chosen by the Treasury Department, and the latter by Carter and Peyton. The arbitrators awarded that the United States should pay the sum of thirty thousand dollars for the property. However just this award may have been, it was of no obligatory force upon either of the parties, further than as evidence of the value of the property, and the United States seemed slow to make the purchase at such a price. The evidence furnished the committee leaves with them the conviction it was not too much, the land having a peculiar value by its location over other lands of a similar quality at other places, and from the uses to which it may be applied. In fact, it is a tract of land the United States must own; and the committee decline the task of defining what it is constitutes value, or in what it consists, but may be permitted to remark, the property in question has the essential elements. They are inclined to the opinion that, under all the circumstances, the price agreed upon by the arbitrators was not exorbitant. They are not singular in this opinion; for, about the time of the award, the United States recovered a judgment against Carter for a large sum of money, upon which an execution

was issued, and levied upon his undivided interest in the land in question. Appraisers were appointed, according to the laws of Louisiana. One of them valued Carter's interest at twenty two thousand five hundred dollars, and the other at fifteen thousand. The two not agreeing, an umpire was appointed by the marshal, and the value was fixed at fifteen thousand dollars. On the 7th of January, 1843, a sale took place, and the United States became the purchasers at the sum of fifteen thousand dollars. Up to this time it seems that the discovery had not been made that the light-house did not stand upon the land entered by Fitzgerald and wife, upon which they resided, and by them conveyed to Carter and Peyton; for it is agreed on all hands that the tract which it is now insisted they entered is of little or no value, and is admitted not to be the one upon which they resided, and of which they had the right of pre-emption.

The United States became, by purchase, the owners of Carter's undivided interest, and he received therefor the sum of fifteen thousand dollars in a credit upon the judgment recovered against him by the United States. Under this purchase, the government is in the possession of the property, and Peyton has received nothing for his interest but the necessity of paying taxes, and the heavy expense of a protracted litigation with the United States about a tract of land in which it is now said they had and have no sort of interest, nor desire to own.

A relation or history of the negotiation between Peyton and the United States, about the sale and purchase of the land in question, might be interesting to the curious and useful to the land-jobber, but does not lie in the line of duty prescribed to this committee. It is, however, proper to remark, that, for years, the difference between the parties was about the price; but, when that was settled by arbitration, then the objection was started, that the light-house was upon section 11, and not upon section 8; that Fitzgerald and wife had not entered the land upon which they resided; and that there was, therefore, no conflict between their entry and the right claimed by the United States to the tract of land upon which the light-house stands. It is quite late, to say the least of it, to make this objection, after a suit by the United States, against Fitzgerald and wife, commenced on the 5th of January, 1837, describing the land sued for as section 8, and prosecuted to 1841, when it was decided in the Supreme Court against the claim of the United States; and, after the purchase of Carter's interest, at execution sale, in 1843, by the United States, at the sum of fifteen thousand dollars, the appraised value of his interest in the tract of land upon which the light-house stands.

The committee think this objection should not be made by the United States, for, waiving all technical reasons, such as estoppel by the judgment of the Supreme Court, no doubt has existed at any time but that Fitzgerald and wife intended to buy, and the United States to sell, the tract of land upon which they resided, and that that is the tract upon which the light-house stands; so that, in fact, there is no difficulty as to the *locus in quo*; and if de-

signated as section 8, when it is section 11, that mistake cannot affect or impair the title of a pre-emptioner. In cases of ordinary purchasers, the government is bound to see that its titles are good, and made good against its own errors and mistakes. The powers and duties of survey and sale are in it, and it is proper to consider that to have been done which ought to have been done, and what it does by an officer it does by itself, and therefore shall not take advantage of its own wrong. It is well settled, that if an ordinary purchaser bid at a public sale by government, or buy land subject to entry from one of its officers, an incorrect survey merely shall not deprive him of location, and the profits of it. Would it not be very impolitic, as well as unjust, for the government, in such cases, to disturb its own titles and the settlement of its territory? In this case there was a survey, a plat approved, certified, and placed in the hands of pre-emptioners to guide them in their entries in the land office merely; not to guide them in their locations. A pre-emptioner's title is not determined by survey, but by the act of 1830, revived and continued for two years by the act of 1834. Under this law, Fitzgerald and wife were pre-emptioners, and had a settlement and location. What was necessary to make them a title to their settlement and location? In ordinary cases, the entry identifies the land purchased, and the survey identifies the entry; but, in cases of pre-emption, settlement prior to entry begins the title and identifies the location. The act of 29th May, 1830, revived and extended for two years by that of 1834, provides, "that every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivates any part thereof, &c., shall be, and he is hereby, authorized to enter with the register of the land office for the district in which such lands may lie, by legal subdivisions, any number of acres, not more than 160 acres, or a quarter section, *to include his improvement, upon paying to the United States the then minimum price of said land.*" Fitzgerald and wife settled, occupied, were in possession, cultivated a part, entered with the register for the district the 160 acres which included their improvement, legally subdivided by the duly authorized surveyor general, who approved, certified, and furnished to them the plat, and paid to the United States the then minimum price. What more could there be, or was needed, to make title? But it is objected the survey did not correctly subdivide and designate their location. The answer is, the law gave them their actual location, (such is its intent and meaning,) and their settlement defined that, not the survey, which was never meant to locate them. They were allowed to settle and locate themselves, and the surveyor could not change their location. The surveyor's plat may be proof, and the first proof in the case of an ordinary purchaser, but there is higher proof—*settlement*—in the case of a pre-emptioner, as may be seen by inspecting the second section of the act of 29th May, 1830; the third and fourth sections of same act, and the second section of the act of 1834. If this reasoning be not correct, and the pre-emptioner may be disturbed in his actual location by an error in a survey, or his own

misdescription as to the number of the section; as in this case, if the survey be allowed to show that the enterers settled section 11, when the actual settlement shows for itself where it is, pre-emption titles are extremely unsafe, and rather more technical than certain.

It is believed this objection cannot be urged, for another reason. It was known to the government from the beginning, and was made known to the court on the trial, yet it is insisted the court only quieted the title of Fitzgerald and wife to section 8, as that is the number mentioned in their certificate of entry, that the tract claimed by the United States, and on which the light-house is built, does not lie in section 8; and, therefore, Fitzgerald and wife have no title to the tract upon which the light-house stands. If the objection be valid, it is strange the government did not sooner set it up, and thereby save or prevent litigation, and consequent expense. It was known to the government before, and was made known through the counsel of the United States to the Supreme Court—for it appears from the sketch of the survey filed in court by the United States to sustain their petition—that the tract on which the light-house stands, and which was the one in dispute, did not lie in section 8; and if important, the court was bound to take notice of the fact, and, of course, could not have quieted the title of Fitzgerald and wife, because the pre-emption laws only authorize the settler to enter the particular spot which he cultivates, and on which he actually resides; and the certificate of entry can entitle him to no other, that having reference to and being founded upon the proof of occupancy. The number of the section is only a means of identification, and when that is admitted on all sides to be incorrect, other evidence which designates the particular spot will be substituted, and the court, as in this case, decide upon the respective rights of the parties to the particular tract in dispute and not be controlled by an erroneous number. It will be found upon examination of the evidence in this case, that Fitzgerald and wife resided upon but one particular spot the whole time he held the situation of boarding officer; that that spot was the only inhabitable tract in that section of country; that their residence was well known; that the spot on which they resided was the one they applied to enter, and which is now claimed by their bargainners; that it is the very spot on which the United States have erected the light-house; that the spot on which the light-house is built is the one Fitzgerald and wife were understood by the government officers to enter; that it is the spot understood by all parties to be intended by section 8, in the certificate of entry; that it is the only one to which they ever had any title, or ever claimed as occupants, and that it is the particular spot for which the government sued them, and failed of recovery. All these facts being conclusively proven, every doubt as to the right to the particular tract in question, on account of this error in the number mentioned in the certificate, must necessarily be at an end, and the fact established, that the tract which Fitzgerald and wife claimed, and which was in dispute before the court, and to which the court quieted their

title, is the identical tract on which they resided, and on which the light-house now stands. The court was aware of the error in the certificate, yet decided against the United States, and by the decision say, in substance, that the tract on which the light-house was built was the one to which Fitzgerald and wife were entitled, and the mistake in the description, by an error in the number, was immaterial, there being sufficient evidence to show the tract intended; thereby once and forever establishing the title of Fitzgerald and wife to the tract in question, and demonstrating the absurdity of any objection on account of a mistake in the certificate of entry. The word absurdity is used, because the objection is not made by an innocent subsequent purchaser, relying upon the want of notice of the place intended to be appropriated by the first enterer, but it is made by the vendor to avoid a fair sale, and to retain a tract of land sold, and intended to be sold, and for which the purchase money had been received.

There is still another objection urged against the title of Fitzgerald and wife, to which it is proper the committee give their attention, in the discharge of their duty. In 1842, by a resolution of Congress, the papers relating to the title of the United States to the light-house of the southwest pass of the Mississippi were referred to Mr. Legaré, the then Attorney General of the United States, for his opinion. He did not consider the United States concluded from inquiring into the validity of the title of Fitzgerald and wife, by the judgment of the Supreme Court, in the case of the United States against them, in 15th Peters's Reports, 407. He admits that the Supreme Court having passed upon the subject in a petitory action, and not only rejected the claim of the United States to be put into possession, but quieted the possession of Fitzgerald and wife, presents a serious difficulty. That the United States are concluded upon all the points adjudged in the Supreme Court. That the United States had put but two points in issue: "1st. That Fitzgerald's possession was theirs, because he was put upon the *locus in quo*, as their agent, and so could not claim adversely to them as a pre-emptioner, standing as an independent possession. 2d. That the lands had been appropriated by government before the supposed entry was made by the pre-emptioner at the land office."

These points having been decided in favor of Fitzgerald and wife, it is not now competent, in the opinion of the Attorney General, to raise a question upon them. It is *res judicata*, and concludes the government; but he raises a new point, and that is this, that the land in question was not subject to entry at the date of the entry of Fitzgerald and wife, because, as he insists, no plat of the township had been made out, duly certified and filed with the register of the land office by the surveyor general, and concludes that on that account the land officers in granting the entry had no jurisdiction upon the subject. He insists this point was not made, and was not decided upon in the courts by any necessary implication. To the correctness of this opinion the committee are not prepared to give their assent, though it is by no means necessary

for them to question its correctness for any purposes they have in view. They will, however, remark, if a new suit were brought by the United States to recover the possession of the land in question, and the plea of *res judicata* filed thereto, the reasoning of the Attorney General would not be found to be a sufficient answer, and a better fate would not attend them if a bill were filed in chancery. In fact, the Attorney General seems to have had, at least, some doubts of the correctness of his opinion, for at the end thereof he says: "But seeing that the case is not without difficulty, seeing that a judgment of the Supreme Court, apparently on the very same matter, has given countenance to the claim, I would recommend, as in the case of the Pea Patch island, that Congress should be asked to authorize a compromise on the same basis as in the Pea Patch case; that is, 1st, that a title unincumbered by any claim whatever be obtained; 2d, that it be obtained on moderate and reasonable terms; 3d, that the value of the land be estimated without reference to the expense laid out upon it, but simply to its local advantages."

It is proper to observe, that the opinion and argument of Mr. Legaré is founded wholly upon the assumed fact, that no approved and duly certified plat of survey was returned by the surveyor general to the register's office at New Orleans prior to the entry of Fitzgerald and wife; and this fact is taken as made out by a letter of the 10th of August, 1842, from the Commissioner of the General Land Office to the Attorney General. The fact was so, in the opinion of the commissioner, and that opinion was founded upon the report of the register and receiver at New Orleans of the 22d of August, 1836, reporting certain applications for entry under the act of 19th of June, 1834, which were not received because of the want of a plat of the land claimed, the said land being the identical tract entered by Fitzgerald and wife. Also, upon a letter of the then surveyor general, dated 3d September, 1841, showing that not only no plat of the land in question was protracted at the surveyor general's office, but that the field notes of the survey, as made on the field, were not examined and approved by his predecessor until the 27th of June, 1836; and upon the fact that the sketch map, made in the Supreme Court, in the case of the United States against Fitzgerald and wife, or rather the certificate thereto, was dated the day after the date of Fitzgerald's entry.

The committee will not decide whether this evidence does or does not prove the fact assumed by the Attorney General, but content themselves with a brief reference to the testimony on the other side. In the petition of the United States against Fitzgerald and wife, dated 5th January, 1837, it is said, after a description of the land, "*according to an authentic plan to be exhibited to the court.*" This petition was filed by the district attorney of the United States in the State of Louisiana, where the land lies, and where the register's office is situated in which the entry was made; and it is hardly to be presumed that the law officer of the government would have been so remiss in his duty as not to have made the want of a plat

filed with the register a point in his case, if authorized by the truth, to say nothing of the register permitting an entry to be made without proper authority, and the very late discovery of so important a fact, and one so seriously affecting the interest of the United States.

In the statement of the case in 15th Peters's Reps., 407, it is said that "the entry had been *regularly made* in the office of the register of public lands in Louisiana, under the act of Congress of 1834, on the 18th June, 1836, and the purchase money paid to the United States." On the 2d day of June, 1836, Fitzgerald and wife made their application in writing, and sworn to, to enter the land in question, and say: "We apply to become the purchasers of a certain tract of land, situate and lying in township No. 24, of range No. 30 east, *designated as and being section No. 8, containing 160 acres, agreeably to the township plat on file in the register's office.*" Mr. Morgan, late collector at New Orleans, and Mr. Newcomb, the surveyor general of Louisiana, in a statement made by them on the 9th of August, 1844, say: "We have examined the plat filed by the defendants in the case of Fitzgerald and wife, in the circuit court of the United States for the eastern district of Louisiana, as requested by your note of yesterday, and find that it was a properly approved and authenticated map by the late surveyor general, K. T. Williams, and, as such, must have been returned by him to the office of registry of the southeastern district, although no duplicate thereof had been retained in the surveyor general's office, which induced the letters alluded to by you as having been addressed by us to the Secretary of the Treasury and the Commissioner of the General Land Office, representing our belief that no plat of said lands had been duly approved or returned at that time. The plat we have examined, which was unknown to us at that time, has all the official sanction which can be given to a document of the kind."

The committee think the ground upon which Mr. Legaré founded his opinion is, at least, of questionable existence; and they are strengthened in this belief by an opinion expressed by the late Secretary of the Treasury, the Hon. George M. Bibb, who said, when negotiating with Mr. Peyton for his interest in the land in question, "I am convinced that your title to the moiety is clear and undoubted." Upon a view of the facts, and all the circumstances of this case, the committee are of the opinion that, as to the land in question, the United States ought not to seek to disturb the judgment of the Supreme Court quieting the possession in Fitzgerald and wife, in reference to whom there is no pretence of fraud, other than that Fitzgerald was an officer of government, and took advantage of being such to settle this land, which the court has expressly decided was lawful. The committee are further of the opinion, with Mr. Secretary Bibb, "that the purchase of the estate of Mr. B. Peyton, in this section of land, is indispensable to the commerce and navigation and substantial interests of the United States. That the United States ought to purchase the estate and

title of Mr. Peyton, because the occupation of the property by the United States and by Mr. Peyton as co-tenants is incompatible with the public interest, and repugnant to the nature and extent of the use for which the United States must have the possession and exclusive dominion;" and in accordance with these views they report a bill.

REPORT

The Committee of Claims, to whom was referred the "petition of William H. Prentiss for additional compensation as assistant messenger in the Department of State," have had the same under consideration, and adopt the report made thereon by Sir. Rank of the Committee of Claims, at the second session 1846 Congress, as follows:

February 20, 1847.

Mr. Rank made the following report:

The Committee of Claims, to whom was referred the "petition of William H. Prentiss for additional compensation as assistant messenger in the Department of State," have had the same under consideration,

It appears that the petitioner, who at the time of his appointment as an assistant messenger in the State Department, was required to discharge, and did discharge for a series of years, the functions of a messenger, in which additional duty he had never received any compensation. Among the papers in a letter signed by the private Secretary of State, attesting the fact of his discharge from the service, he also stated that he received for his services and his expenses, and his family, the sum of one thousand five hundred and six dollars and fifty cents. Under these circumstances, your committee think there is cause to the allowance of additional compensation for the period of service of the petitioner, and the order of the petitioner is hereby granted, and therefore recommend the passage of the accompanying bill.

